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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1046

THE PRESS CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent;*
TRI-CITY NEWSPAPER GUILD ET AL.,
Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

ELISHA HANSON,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Press Co., Inc., respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia to review a decree of said court entered on December 9, 1940 (R. 1331-1333) and modified February 14, 1941 (R. 1345-1346) and March 24, 1941 (R. 1358-1359), modifying and enforcing as modified an order of the National Labor Relations Board (hereinafter called the Board) which directed petitioner to cease and desist

from certain unfair labor practices under the National Labor Relations Act (hereinafter called the Act) 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.* and to take certain affirmative action.

The opinions of the court below (R. 1307-1329, 1345-1346, 1354-1357, 1359-1360) are as yet unreported. The decision and order of the Board are reported in 13 N. L. R. B. 630.

A.

Summary Statement of the Matter Involved.

The Press Co., Inc., since August 1, 1937, has owned and published in Albany, New York, an afternoon newspaper known as the "Knickerbocker News" (R. 1217). On June 30, 1937, petitioner, confronted with continuing losses in its operations (R. 152), was compelled to abandon its morning and Sunday newspapers theretofore published and to publish thereafter only an afternoon newspaper.

This reduction of operations necessitated a reduction of petitioner's staff by the discharge of more than 150 employees in all departments (R. 110, 1224). The selections of the employees to be retained were made by department heads who were instructed to retain persons best equipped to serve on the basis of merit and fitness, irrespective of seniority or other considerations (R. 821, 1100-1101). The lists of retained employees were submitted to the publisher for his approval and approved by him (R. 822, 1103).

Pursuant to the foregoing instructions Lewis, petitioner's editorial director, found it necessary to discharge 29 editorial employees. Thereupon the Tri-City Newspaper Guild (hereinafter called the Guild) demanded that petitioner reinstate seven named employees, including Scannell, Wanhope and Christman, the three editorial employees involved in this petition (Board Exhibit 74). Two of these seven employees disavowed authority of the Guild to act for them

and denied any discriminatory act by petitioner (R. 444, 836, 839, 842-843).

The Guild's demand was rejected, whereupon it filed charges with the Department of Labor of the State of New York alleging discrimination in the discharge of six named employees by reason of their activity in or in behalf of the Guild (R. 446). After petitioner offered in good faith to abide by the finding of the State Mediator (Board Exhibit 76, 80) the Guild withdrew from the proceedings and filed charges with the Board herein (R. 448).

The Board issued its complaint against petitioner and Gannett Co., Inc., which owned all of the common and half of the preferred stock of petitioner, charging violation of Section 8 (1) and (3) and Section 2 (6) and (7) of the Act (R. 46-50). On July 18, 1939, the Board entered its order which, *inter alia,* required the reinstatement by petitioner with back pay of Scannell, Christman and Wanhope (R. 1230-1232).

The court below modified the Board's order in certain respects but as modified enforced the order with respect to Scannell, Christman and Wanhope, holding, in effect, that the findings of the Board therewith were sustained by the evidence (R. 1310-1315).

In modifying the Board's order the court below, *inter alia,* set aside paragraph 1 (c) thereof (R. 1319) which ordered respondent to cease and desist from

> "In any manner interfering with, restraining, or coercing their employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act" (R. 1230-1231).

Subsequently, on petition of the Board for rehearing on the sole ground that the court below committed error in eliminating paragraph 1 (c) of the Board's order (R. 1334-1343), the court below ordered the reinstatement of the said paragraph (R. 1345-1346).

Thereafter this Court in *NLRB* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941, set aside a paragraph in a Board order expressed in language identical to paragraph 1 (c) in this case. Upon request of the court below memoranda were filed by the parties concerning the pertinence of the *Express Publishing Company* decision to the present case (R. 1346-1348, 1348-1354). The court below thereupon ordered a modification of paragraph 1 (c) to read as follows:

> "In any manner interfering with the administration of the Guild or its membership" (R. 1358).

B.

Statement Disclosing Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C., Sec. 347 (a)), and Section 10 (e) and (f) of the Act. The decree of the United States Court of Appeals for the District of Columbia to be reviewed was entered on December 9, 1940 (R. 1331-1333) and modified February 14, 1941 (R. 1345-1346) and March 24, 1941 (R. 1358-1359).

At the opening of the Board hearings the Trial Examiner denied petitioner's motion to dismiss based on the grounds that (1) the Board lacked jurisdiction and (2) the proceeding was in violation of petitioner's rights as guaranteed by the First and Fifth Amendments to the Constitution of the United States (R. 76, 77). These contentions were either rejected or disregarded in the findings and con-

clusions of the Board pursuant to which its order against petitioner was entered (R. 1211-1232).

Upon review of the Board's order by the court below these contentions were again asserted but were decided adversely to petitioner. The court below also rejected petitioner's contention that the findings of fact of the Board with respect to the parts of the Board's order enforced by the court below were not supported by substantial evidence.

The conclusions of the court below present for determination: (a) important questions of Federal law which have not been, but should be, settled by this Court; (b) Federal questions decided by the court below in a way probably in conflict with applicable decisions of this Court; (c) an important Federal question of whether the court below has so materially departed from the course of judicial review contemplated by the Act as to call for an exercise of this Court's power of supervision.

C.

Statute and Constitutional Provisions Involved.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are set forth in Appendix B at pages 61-66.

The text of Article I, Section 8 and the First and Fifth Amendments to the Constitution of the United States is set forth in Appendix B at pages 60-61.

D.

Questions Presented.

1. Whether the Board has jurisdiction over the labor relations of an employer who publishes a newspaper of which only 559 copies out of a total of 55,875 circulate outside of the State of publication and which is a unit of a business that as a whole is inherently local.

2. Whether under the Act the court below in the course of judicial review of the Board's order is authorized to arrive independently at its own findings of fact and to draw inferences not drawn by the Board to support a paragraph of the Board's order which is not otherwise based upon findings of fact supported by substantial evidence.

3. Whether the requirement of substantial evidence is satisfied by inferences drawn from the failure of one executive of the employer to testify where such inferences alone are relied upon to give vitality to circumstantial evidence otherwise considered as lacking in rational probative force.

4. Whether it is an unfair labor practice in the course of reducing a staff to discharge (a) a city editor who habitually failed to comply with instructions of his superior; (b) an employee who lacked the qualities of versatility and cooperativeness and above all entertained avowed Communistic views creating a bias incompatible with the effective performance of the duties of an editorial worker; and (c) an employee whose work was distinctly below average, sloppy and inferior, who himself recognized his own inadequacies, and who improperly had come into possession of the stenographic notes of his editorial director's confidential secretary.

5. Whether the freedom of the press as guaranteed by the First Amendment to the Constitution of the United States is abridged where the Board's order (a) superimposes its judgment over that of the publisher of a newspaper in the selection and assignment to work of editorial employees on the basis of fitness and merit; (b) in effect compels the publisher to lay before the Board for review the reasons why one editorial employee was selected as against another; and (c) rests upon unfavorable inferences which came into being only by reason of the failure of the publisher's editor-

ial director to testify concerning his exercise of judgment as to the relative merits of particular editorial employees.

6. Whether a full and fair hearing as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States is denied where, prior to the issuance of a complaint and hearings thereon, there is positive evidence not challenged by the Board during the hearing that officials of the Board were credited by the complaining union with having given assurances to that particular labor organization of an outcome favorable to said organization; and where such prejudgment is further supported by evidence of statements and conduct of the Board's attorney, the conduct of the Trial Examiner and a systematic disregard by the Board in arriving at its findings of evidence favorable to the employer.

7. Whether the Board, upon finding that an employer has engaged or is engaging in specific unfair labor practices, is empowered to order the said employer to cease and desist from other practices not found to be pursued and which are unrelated to and not forseeable from the past conduct concerning which the Board has made findings.

E.

Reasons Relied On for the Allowance of the Writ.

1. *A novel question of jurisdiction over an inherently local business which is a unit of a business in general inherently local and not of a national character.*

This Court has not passed upon an important Federal question of jurisdiction presented by the specific factual situation herein.

The court below failed to discharge its judicial duty of ascertaining whether petitioner's activities affected commerce in such a close and substantial manner as to enable

the Board to exercise jurisdiction over its labor relations. It merely recited certain findings of the Board with respect to petitioner's operations, and, without any analysis of the effects of the facts found, erroneously held that under the rule announced by this Court in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937) and *NLRB* v. *Fainblatt*, 306 U. S. 601 (1939) petitioner's activities affected interstate commerce.

This Court has held that the business of preparing, publishing and printing a daily newspaper is peculiarly local and distinct from its circulation whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). And see *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

The record clearly demonstrates that petitioner is engaged in a purely local business, namely, furnishing information in the form of news, editorial comment and advertising to the people in the area immediately surrounding Albany, the place of publication.

The court below erroneously stated that 2,000 out of a total in excess of 45,000 copies of petitioner's newspapers circulated outside the State of New York (R. 1310). No such finding was made by the Board (R. 1217-1218). At no time did the out-of-state circulation of any of petitioner's newspapers reach that figure (R. 1217-1218) and in September, 1937, a month typical of petitioner's circulation since its reduction of operations, only 559 copies out of a total of 55,875 of petitioner's newspaper circulated outside the State of New York, despite the close proximity of Albany to cities and towns in Vermont and Massachusetts (R. 107, 1217).

This trivial out-of-state circulation is inherent in the local nature of petitioner's business. Petitioner's newspaper is a unit of a business which in general is inherently of

a local as distinguished from a national character. The dominant aspect is service to the community in which the individual unit of the business is located.

On all the existing circumstances established by the record petitioner's operations do not have a close and substantial relation to interstate commerce. In all of the cases decided by this Court under the Act the employer was dependent upon the channels of commerce for the distribution of his product.[1] That fact is non-existent herein.

The court below also relied upon petitioner's membership in the Associated Press [2] and its use of raw materials, advertising and features received from other states to support the jurisdiction of the Board. Whether this can be done presents an important Federal question upon which there is no controlling decision of this Court.

The court below went to lengths never gone to by this Court in upholding Federal intervention in an inherently local business. Petitioner submits that this Court should review that important Federal question.

2. *Departure from the course of judicial review contemplated by the act requiring exercise of this Court's power of supervision.*

A fundamental Federal question which calls for the exercise of this Court's power of supervision is presented by the departure by the court below from the course of judicial review contemplated by the Act as interpreted by this Court.

This Court has recently warned that the Board has the exclusive power to find the facts, *NLRB* v. *Waterman Steamship Corp.*, 309 U. S. 206 (1940) and that "Congress en-

[1] E.g., *NLRB* v. *Fainblatt*, 306 U. S. 601, 607-608 (1939); *NLRB* v. *Bradford Dyeing Association*, 310 U. S. 318, 326 (1940).

[2] In *Associated Press* v. *NLRB*, 301 U. S. 103 (1937) the employer held subject to the Act was directly engaged in interstate communication.

trusted the Board, not the courts, with the power to draw inferences from the facts'', *NLRB* v. *Link-Belt Co.*, 311 U. S. 584 (1941).

The court below ignored the limitations upon judicial review contained in the foregoing warning in its review of the evidence of surveillance. It first refused to sustain the conclusion of the Board that surveillance *ipso facto* violated the law (R. 1315). It then took it upon itself to arrive independently at a finding of preliminary fact based upon evidence that ''on the day following the Guild meetings Lewis was in possession of detailed information concerning what went on at the meetings and what the Guild was planning'' (R. 1315) and further evidence, which the court said was ''not referred to by the Board'' that ''during a number of conferences Lewis assured employees that 'they [the employers] were well apprised of what was happening in the Guild' '' (R. 1315).

Obviously no such finding was made by the Board since the Board, in the words of the court below, did not even refer to the evidence in question.

Finally, the court below arrived independently at a new finding of ultimate fact, namely, that the knowledge acquired by petitioner's editorial director did actually interfere with union activity (R. 1315). No such finding was made by the Board.

The effect of the action of the court below was to establish two findings of fact—one preliminary, the other ultimate—to supply a causative factor essential to the enforcement of paragraph 1 (b) of the Board's order which the court below admitted would otherwise have been unenforceable.

This Court should review these departures from the scope of judicial review permitted by the Act.

3. *Inferences from failure to testify as substantial evidence—a unique question of judicial review.*

The court below characterized as "the real bone of contention in this case" the question of whether Lewis, petitioner's editorial director, purposely availed himself of the opportunity to reduce his staff to discriminate, because of his personal animosity toward the Guild, in the discharge of certain editorial employees, including Scannell, Wanhope and Christman, the three employees involved in this petition (R. 1312).

On this question the court below admitted there was no direct evidence but sustained the Board's finding of discrimination on the basis of inferences drawn by the Board from circumstantial evidence which the court below described as follows: oral statements of Lewis; his asserted familiarity with the activities of Guild members; his failure to testify; the excessive proportion of Guild members selected for dismissal; a rather casual appraisal of the relative merits of employees (R. 1312).

But all of these inferences were held by the court below to rest upon Lewis' failure to testify as shown by the following statement from its opinion:

> "*If, in this state of the record, Lewis had gone on the witness stand and testified* that he had exercised the right to discharge Scannell, Wanhope, and Christman because he was able to retain other men who were their superiors in the work of the newspaper, or because of any dereliction on their part in the discharge of their duties, or that in making his selections he had weighed the relative merits of those whom he retained and those whom he discharged and had based his selection on the ground of merit alone, *the case would have a different aspect. But since he refrained from testifying at all, we are unable to say that the factor of Guild activity, which the Board considered the real cause, can be said to be without support in the evidence.*" (Emphasis supplied) (R. 1312).

This means that the court below in effect held that were it not for Lewis' failure to testify, the circumstantial evidence hereinabove mentioned would have no separate significance and that Lewis' failure to testify gave vitality to this circumstantial evidence which the court below otherwise considered to be lacking in rational probative force.

It is submitted that the requirement under the Act of substantial evidence as governed by the criteria announced by this Court in *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197 (1938) and *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292 (1939) cannot be satisfied by relying solely upon inferences drawn from the failure to testify of petitioner's editorial director. Such inferences in the words of this Court in the *Columbian Enameling* case, would not constitute evidence

> "* * * to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it in one of fact for the jury." (306 U. S. at page 300.)

Inferences from the failure of one person to testify cannot be regarded as substantial evidence where such inferences are not otherwise rested upon evidence of rational probative force. Inferences of this sort cannot be considered

> "* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company* v. *NLRB,* 305 U. S. 197, 229 (1938).

The holding of the court below is in conflict with the criteria announced by this Court in the *Consolidated Edison* and *Columbian Enameling* cases, *supra,* and raises an important Federal question which should be decided by this Court.

4. *A particular form of abridgment of the guaranty of a free press not heretofore received by this Court.*

This Court has never had occasion to consider the particular form of abridgment of the constitutional guaranty of a free press presented by the record in this case.

The Board as an agency of Congress claimed the power to require petitioner to lay before it for review the reasons why one editorial employee was selected as against another.

Petitioner contended that by reason of the First Amendment the Board has no such power (R. 54-56, 66-67, 76, 85, 1173). The First Amendment vouchsafes to the publisher the final responsibility for the selection and assignment to work of editorial employees deemed by him to be qualified by reason of fitness and merit to effectuate the editorial policies of his newspaper (R. 54-55). Petitioner refused to surrender and transfer that final responsibility to the Board.

The fitness and merit of particular editorial employees retained as against particular editorial employees discharged is exclusively a matter of the judgment of the publisher (R. 54-55).

All the Board could constitutionally require was a showing that the discharges in controversy herein were not made because of Guild membership and activities. Such a showing was made by overwhelming evidence that the discharges which were necessitated by the reduction of petitioner's operations were governed wholly by considerations of fitness and merit and were approved by the publisher (R. 822, 1103).

These criteria are in the record (R. 54-55). The final judgment of the publisher in applying the criteria to particular individuals is secured by the First Amendment against abridgment.

On this issue the court below sustained the findings of discriminatory discharges on the basis of unfavorable in-

ferences which came into being only because of the failure of petitioner's editorial director to testify concerning why he chose one editorial worker as against another. Without these inferences the court below said "the case would have a different aspect" (R. 1312).

For the reasons already stated the First Amendment precluded the Board from drawing such inferences. The guaranty of a free press would be devitalized if the right of a publisher to resist a review by the Board of his judgment with respect to the value of particular editorial employees is turned against him as evidence of any character.

This Court has never passed upon this Federal question in the particular form of abridgment of the guaranty of a free press here presented. In *Associated Press* v. *NLRB*, 301 U. S. 103 (1937), which the court below failed to distinguish, the issue presented to this Court was the power of the Board to order the reinstatement of an editorial worker upon the basis of an unchallenged finding of fact that his Guild activity was the reason for his discharge.

No such issue is here presented. The Board's findings of discriminatory discharges were vigorously challenged (R. 15-19). The record herein discloses by substantial evidence that the discharges were made pursuant to the discretion of the publisher in enforcing editorial policies of his own choosing by selecting for retention editorial employees whom he regarded as best adapted on the basis of merit and fitness to effectuate such policies (R. 54-55, 821, 1100-1101). There is no substantial evidence to the contrary.

If the Board can superimpose its judgment over that of the publisher on the foregoing matters then a "pervasive threat of censorship" has come into existence. Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940).

This Court should review the novel constitutional question thus presented.

5. Violation of due process of law under circumstances never before reviewed by this Court.

Petitioner's contention that the proceedings, findings and order of the Board violated its substantial rights as guaranteed by the due process clause of the Fifth Amendment presents a question of constitutional right under circumstances never before reviewed by this Court.

The court below said:

> "* * * there was no showing from which we can or should infer that either the trial examiner or the Board members had made statements showing prejudgment of the case. If any statements made by the prosecuting arm of the Board created the unfortunate impression that the case was foreclosed before it was begun, this was the result of those provisions of the statute which combine in the same agency not only the power to investigate, initiate, and prosecute, but as well the power to hear and decide. But responsibility for such matters is with the legislature and not with us. What is complained of as later occurring in the argument, may reasonably be considered as having resulted from the implications of counsel's remarks, and we know of no rule of judicial conduct applicable either to court or board which requires silence in the face of an imputation of dishonorable conduct." (R. 1309-1310.)

The foregoing statement both misconceives the duty of the reviewing court and inaccurately characterizes petitioner's contentions.

The responsibility for due process ultimately rests upon the court and not upon the legislature. The very fact that the provisions of the statute telescope into a single agency prosecuting and judicial functions imposes upon the court an even greater responsibility to scrutinize the record for material departures from the historical and traditional processes which are of the essence of fair adjudication.

Questions of constitutional right are always open to ex-

amination by the court.[3] There must be fairness in substance, tendency and effect, not merely formal fairness.

Since the court below disavowed responsibility for the results of the commingling of prosecuting and judicial functions in the same agency, petitioner has no assurance that the circumstances set forth in the record and upon which its contention of violation of due process was based were given the scrutiny to which they were entitled.

At every stage of the proceedings petitioner insisted that it had been denied due process by being deprived of an impartial hearing (R. 51, 57, 68, 77, 218, 1173, 1207-1208).

Petitioner's contention was based upon (a) positive evidence that prior to the issuance of a complaint and hearings thereon, officials of the Board were credited by Guild members with having given assurances to the Guild of an outcome favorable to it (Board Exhibit 86; Petitioner Exhibit 4; R. 956, 986) and this evidence was unchallenged and undenied by the Board during the hearing; (b) further positive evidence substantiating such prejudgment as shown by statements of the Board's attorney (R. 162, 163), his conduct in acting as agent for the Guild (R. 757) and the conduct of the Trial Examiner (R. 218, 1173, 1207-1208); and (c) systematic disregard by the Board in arriving at its findings of evidence favorable to the petitioner.

There is no basis in the record to warrant the conclusion of the court below that the remarks of petitioner's counsel during oral argument before the Board carried an imputation of dishonorable conduct (R. 1309-1310).

In the light of the record counsel for petitioner would have been derelict in his duty had he failed to call the attention of the Board to matters supporting the charge that the Board had prejudged the case. These matters stood unchallenged in the record and the Trial Examiner made no reference to them in his report to the Board (R. 1173, 1207-

[3] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47 (1937).

1208). Having discharged his duty in that respect counsel for petitioner felt that the record spoke for itself.

A charge of prejudgment is a charge of bias. Similar charges have been made in other cases before the Board and were sustained by the courts.[4] In this case the record shows that officials of the Board opened themselves to the charge that they conceived their role to be that of partisans. A statute which consolidates in the same agency the functions of investigation, prosecution and decision itself creates the very processes by which freedom of quasi-judicial officers from bias or partisan viewpoints is likely to be impaired. Uncontradicted evidence in the record shows that under the circumstances of this case petitioner had more than reasonable grounds to believe that it had been deprived of the protection of due process.

A charge of bias is not necessarily to be characterized as an imputation of dishonorable conduct. The system of adjudication sanctioned by the statute herein may be so self-defeating of impartial judgment in the controversial field of labor as to lead officials sincerely to believe that it is their duty to play the role of the advocate of the employees.

Lack of separation of functions increases the danger that the system may germinate this conviction in the minds of officials who were intended to perform quasi-judicial functions. In this setting a charge of prejudice properly raises the constitutional issue that the Board's practices are repugnant to due process.

This Court should review the fundamental question of constitutional right thus presented under circumstances not heretofore considered by this Court.

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[4] *Inland Steel Co.* v. *NLRB*, 109 F. (2d) 9 (C. C. A. 7th, 1940); *Montgomery Ward & Co.* v. *NLRB*, 103 F. (2d) 147 (C. C. A. 8th, 1939).

6. *The scope of paragraph 1 (c) of the order is in conflict with the principles announced by this Court in NLRB* v. *Express Publishing Company.*[5]

If this Court were to affirm the judicial review of the Board's findings by the court below, then an important question is presented concerning the scope of paragraph 1 (c) of the order as modified by the court below (R. 1358).

In its original decree the court below eliminated paragraph 1 (c) of the Board's order as set forth at page 3 herein (R. 1319). Subsequently, upon petition of the Board for rehearing the court below restored the said paragraph (R. 1345-1346). Thereafter, on the authority of *NLRB* v. *Express Publishing Co., supra,* the court below in its final decree modified paragraph 1 (c) to read as follows:

> "In any manner interfering with the administration of the Guild or its membership". (R. 1358.)

On the assumption that this Court ultimately approves the review of the evidence by the court below, it is submitted that paragraph 1 (c) as modified is not supported by the Board's findings and thus fails to conform to the principles announced by this Court in the *Express Publishing Company* case.

That case expresses the general principle that the order of the Board cannot restrain practices unrelated to and not forseeable from the past conduct of the employer concerning which the Board made findings.

The only practices with respect to which the Board's findings were upheld by the court below are discriminatory discharges in violation of Section 8 (1) and (3) (R. 1310-1312), and surveillance in violation of Section 8 (1) of the Act (R. 1315). Assuming arguendo that this Court sustains these findings, then paragraphs 1 (a) and 1 (b) of the

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[5] No. 442, this Term, decided March 3, 1941.

order fully restrain these practices and embrace every act the threat of which in the future is indicated because of similarity or relation to the practices found by the Board to have been committed by the petitioner in the past. These paragraphs would then be adequate to prevent the order from being "evaded by indirections or formal observances".

There is no justification under such circumstances for any additional injunctive provision. Paragraph 1 (c) is directed against a new violation unlike and unrelated to those in which petitioner was found to have been engaged.

The court below erroneously broadened the practice of surveillance to include new and different acts, *viz:* interference with the administration of the Guild or its membership in any manner. This was done on the untenable theory that such acts are related to conduct of a general nature in which petitioner was found to have engaged.

Nothing could be further from the limited aspect of this case. The court below held that the only practices herein sustained by the evidence were surveillance and discriminatory discharges (R. 1310-1315). It also held that there was no evidence of other coercion, restraint or interference (R. 1319, 1345). It conceded that this case does not have the complexion of the series of varied acts disclosed in *NLRB* v. *Fansteel Corp.*, 306 U. S. 240 (1939) (R. 1357).

If it be finally held that this review of the evidence is correct, on what basis then, could the breadth of the language of paragraph 1 (c) be justified? Interference with the administration of a labor organization is specifically prohibited by Section 8 (2) but petitioner was not charged with or found to be violating this provision of the Act. Why was this part of Section 8 (2) dragged into the order when the court below admitted that all of the other practices condemned by Section 8 (2), (4) and (5) were out-

side the scope of the conduct which petitioner was found by the Board to have committed?

It is indisputable that the court below has revived in another guise the catch-all provision condemned by this Court in the *Express Publishing Company* case. Paragraph 1 (c) virtually orders desistance from any unfair labor practice in violation of the Act. This is apparent from a glance at each subdivision of Section 8 of the Act which might be so interpreted as to subject petitioner to the peril of a contempt proceeding based upon an allegation, however remote, of some form of interference with the administration of the Guild or its membership.

Such broad language will hang over petitioner's head like the proverbial sword of Damocles.

In view of the grave uncertainties created by the vague contours of the language of paragraph 1 (c) if the Board's findings are ultimately sustained, an important question is presented for clarification by this Court of the applicability of the principles anounced in the *Express Publishing Company* case. This question of the administration of the Act should be reviewed by this Court in the interest of litigants who otherwise will be exposed to undue risks of a summons for contempt.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Court of Appeals enforcing with modifications the Board's order be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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